United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

927

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,970

RANDOLPH JENKINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Theodore R. Newman, Jr.
Suite 500, Barrister Building
635 F Street, N.W.
Washington, D. C. 20004

Attorney for Appellant
(Appointed by this Court)

STATEMENT OF QUESTIONS PRESENTED

1. Where neither the Court, nor the attorney for the defendant, informed the defendant of his right to appeal from a judgment of conviction in a criminal case, or of the time in which such an appeal must be noted; and where the defendant is unaware of his right to appeal, or of the time in which such an appeal must be noted; has the defendant been deprived of his right to representation by counsel?

2. Whether ineffective assistance of counsel in failing to inform the defendant concerning his right to appeal and the time in which such an appeal must be noted, is cognizable under Title 28, United States Code, Section 2255?

3. Where the evidence below consists of the unrebutted, uncontradicted, and unimpeached testimony of the defendant that his trial counsel never advised him of his right to appeal from a judgment of conviction in a criminal case, nor of the time in which such an appeal must be noted; and where the trial court in the criminal proceedings did not advise the defendant concerning his right to appeal; and where the unrebutted, uncontradicted, and unimpeached testimony of the defendant is that he was unaware of his right to appeal, or of the time in which such an appeal must be noted; is the action of the trial court in refusing to vacate appellant's sentence and to re-sentence appellant clearly erroneous?

INDEX

	PAGE
STATEMENT OF QUESTIONS PRESENTED	i
TABLE OF CASES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE	1, 2, 3
STATEMENT OF POINTS	4
SUMMARY OF ARGUMENT	5
ARGUMENT:	
I. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INFORM THE DEFENDANT IN A CRIMINAL TRIAL OF HIS RIGHT TO APPEAL OR OF THE TIME WITHIN WHICH SUCH AN APPEAL MUST BE NOTED, IS COGNIZABLE UNDER TITLE 28, UNITED STATES CODE, SECTION 2255	6]
II. THE REFUSAL OF THE COURT BELOW TO FIND THAT APPELLANT HAD SUSTAINED THE ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS CLEARLY ERRONEOUS	7, 8
CONCLUSION	8

TABLE OF CASES

PAGE

* Dillane v. United States, 121 U.S. APP. D.C. 354; 350 F. 2d 732 (1965)..... 3, 6

* Carlisle v. United States, 122 U.S. App. D.C. 240; 352 F. 2d 716 (1965)..... 3, 6

* United States v. U. S. Gypsum Co., 333 US 364; 92 L. Ed. 746 (1948)..... 7

* Jackson v. United States, 122 U.S. App. D.C. 324; 353 F. 2d 862 (1965)..... 8

---

* Cases principally relied upon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,970

RANDOLPH JENKINS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an order of the District Court, dated March 29, 1967, denying the relief sought by appellant pursuant to Title 28, United States Code, Section 2255. Leave to Proceed on Appeal in forma pauperis was granted by the District Court, by order dated April 21, 1967. This Court has jurisdiction under Title 28, United States Code, Section 1291.

STATEMENT OF THE CASE

This appeal is from an Crder of the District Court denying relief under Title 28, United States Code, Section 2255. The objective of the proceeding below was to secure a re-sentencing so as to secure a direct appeal from appellant's criminal conviction in United States v. Jenkins, Cr. No. 1003-62.

In United States v. Jenkins, Cr. No. 1003-62, appellant was convicted of rape and on April 4, 1963, he was sentenced by Judge Tamm to a term of imprisonment of from ten to thirty years. In that trial, appellant, who was then seventeen years old, was represented by Maurice Weeks, Esquire. Mr. Weeks had been retained to represent appellant. Mr. Weeks died on or about October 19, 1963.

Following sentencing, appellant was returned to the D. C. Jail where he remained for a period of approximately four months. Thereafter, he was transferred to the D. C. Youth Correctional Center. On September 26, 1963, proceeding pro se and in forma pauperis, appellant filed in the District Court a Motion For Reconsideration And Reduction of Sentence Pursuant To Rule 35, Of The Rules of Criminal Procedure.

By order of the District Court dated October 24, 1963, William C. Gardner, Esquire, was appointed to represent appellant in the Court below with respect to said motion. On June 14, 1966, said attorney filed a Supplemental Motion To Vacate And Set Aside Sentence Pursuant To Title 28, United States Code, Section 2255.

On March 3, 1967, a hearing was held in the District Court before Judge Walsh. In said hearing, appellant urged that he had been deprived of effective assistance of counsel in the criminal trial. This allegation was predicated on appellant's contentions that he was unaware of his right to appeal; of the time in which such an appeal must be noted; and that neither the Court nor his attorney had informed him concerning these matters.

Subsequent to said hearing, appellee herein, on March 14, 1967, filed an Opposition To Supplemental Motion To Vacate And Set Aside Sentence Pursuant To Title 28, U.S.C., Section 2255. In said opposition, appellee urged:

> 1. That relief would not lie in spite of the holdings of this Court in Dillane v. United States, 121 U. S. App. D. C. 354, 350 F. 2d 732 (1965) and in Carlisle v. United States, 122 U. S. App. D. C. 240, 352 F. 2d 716 (1965); and
>
> 2. That assuming the Court had jurisdiction to grant such relief under Title 28, U. S. C., Section 2255, appellant had failed to sustain his burden of proof establishing his entitlement to such relief.

By order dated March 29, 1967, which said order did not contain Findings of Fact or Conclusions of Law, appellant's motions were denied by Judge Walsh.

This appeal is from that order.

THE STATEMENT OF POINTS

1. Ineffective assistance of counsel in failing to inform the defendant in a criminal trial concerning his right to appeal or of the time within which such an appeal must be noted, is cognizable under Title 28, United States Code, Section 2255.

2. The Court below erred in refusing to find that appellant had sustained the allegations of ineffective assistance of counsel, which he raised in his motion under Title 28, United States Code, Section 2255, in the Court below.

SUMMARY OF ARGUMENT

Where the unrebutted, uncontradicted and unimpeached evidence in the Court below showed that the appellant, a seventeen year-old defendant, was not informed, either by his trial attorney or by the trial court, of his right to appeal from a judgment of conviction in a criminal case, or of the time in which such appeal must be noted; and that the appellant was in fact unaware of his appellate rights; the Court below erred in refusing to find that appellant's sentence in United States v. Jenkins, Cr. No. 1003-62, should be vacated and a new sentence imposed.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INFORM THE DEFENDANT IN A CRIMINAL TRIAL OF HIS RIGHT TO APPEAL, OR OF THE TIME WITHIN WHICH SUCH AN APPEAL MUST BE NOTED, IS COGNIZABLE UNDER TITLE 28, UNITED STATES CODE, SECTION 2255.

At the hearing on his motion to vacate sentence, appellant testified that neither his trial attorney nor the trial court informed him of his right to appeal or of the time in which that right had to be exercised. The trial court took judicial notice of the transcript of the sentencing proceedings. This transcript corroborated the testimony of appellant concerning the court's failure to inform appellant of his appellate rights. The appellant further testified that he was in fact unaware of his appellate rights or of the time in which they must be exercised. All this testimony of appellant was uncontradicted, unrebutted, and unimpeached. The Court below in the proceedings on this motion, without making findings of fact or conclusions of law, denied appellant's prayer for relief.

If the ruling of the Court below was predicated on the proposition which appellee there advanced, to wit, that the court was without jurisdiction to grant the relief prayed, the ruling is contrary to prior decisions of this court and is erroneous. Dillane v. United States, 121 U.S. App. D. C. 354; 350 F. 2d 732 (1965); Carlisle v. United States, 122 U.S. App. D. C. 240; 352 F 2d 716 (1965).

II. THE REFUSAL OF THE COURT BELOW TO FIND THAT APPELLANT HAD SUSTAINED THE ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL WAS CLEARLY ERRONEOUS. (Tr. 5-11, 17, 36-37)

On the other hand, if the Court below found that the appellant had failed factually to establish his entitlement to relief, such finding is clearly erroneous. Appellant testified that his attorney never informed him of his right to appeal or of the time within which such an appeal must be filed. (Tr. 5, 6, 8). Appellant further testified that the trial court did not inform him concerning his appellate right (Tr. 5). That the trial court did not so inform appellant is further shown by the transcript of the sentencing proceedings, of which the Court below took judicial notice. (Tr. 36-37). Appellant, who at the time of sentencing was seventeen years old, testified that he was in fact unaware of his right to appeal or of the time within which such an appeal must be filed. (Tr. 6-7, 10-11, 17). All of the testimony of appellant on each of these points was uncontradicted, unrebutted and unimpeached. Appellant submits that given this evidence, the ruling of the trial court, if based on an unstated finding of fact, was clearly erroneous.

In discussing the "clearly erroneous" test of Rule 52(a), F.R. Civ. P., the Supreme Court has said:

> "A finding is 'clearly erroneous' where although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed". United States v. U. S. Gypsum Co., 333 U. S. 364, 395; 92 L. Ed. 746 (1948)

Where there is no conflict in the evidence, the test of what is "clearly erroneous" is broader that where such a conflict exists. Jackson v. United States, 122 App. D. C. 324; 353 F. 2d 862 (1965).

Here, appellant submits, the evidence is utterly devoid of conflict and there is no evidence to sustain the ruling of the Court below. Rather, appellant submits that the evidence can only lead to the conclusion that the Court below should have granted the motion to vacate sentence.

CONCLUSION

For the reasons set forth above, appellant submits that this Court vacate the order of the Court below and remand with directions to enter an order vacating appellant's sentence and resentencing him.

Respectfully submitted,

Theodore R. Newman, Jr.
635 F Street, NW
Washington, D. C. 20004

Attorney for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,970

RANDOLPH JENKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN J. MCKENNA,
Assistant United States Attorneys.

FRANK X. GROSSI, JR.,
Department of Justice Attorney.

Cr. 1003-62

QUESTIONS PRESENTED

The original conviction was never appealed.

In the opinion of appellee, the following questions are presented:

I. Whether the District Court has the power to vacate and reimpose sentence in a § 2255 proceeding solely for the purpose of allowing a defendant to take an appeal after time to note an appeal has expired, where the failure to take an appeal within the allotted time is due to counsel's failure to apprise the defendant of his right to appeal and the time within which that right must be exercised.

II. Whether, in the event the District Court has the power to vacate and reimpose sentence in a § 2255 proceeding solely for the purpose of allowing an appeal out of time, appellant should, under the circumstances of this case, demonstrate that he was denied the opportunity to present a substantial appealable question under the law as it existed at the time he could have taken but did not take an appeal.

INDEX

	Page
Counterstatement of the Case	1
Statute and Rules Involved	3
Summary of Argument	5
Argument	
I. The District Court properly denied appellant's § 2255 petition in which he alleged that he was not apprised of his right to appeal or the time within which the right must be exercised	6
A. The District Court does not have the power to vacate and reimpose sentence solely for the purpose of allowing a defendant to take an appeal out of time	7
B. Even if the District Court has the power to vacate and reimpose sentence for the purpose of allowing an appeal out of time, under the circumstances of this case appellant should demonstrate that he was denied the opportunity to present a substantial appealable question under the law as it existed at the time he could have taken but did not take an appeal	12
Conclusion	14

TABLE OF CASES

**Berman* v. *United States*, 378 U.S. 530 (1964)	8, 9, 10
Boruff v. *United States*, 310 F.2d 918 (5th Cir. 1962)	9
Calland v. *United States*, 323 F.2d 405 (7th Cir. 1963)	9
Carlisle v. *United States*, 122 U.S. App. D.C. 240, 352 F.2d 716 (1965)	6, 10
Carrell v. *United States*, D.C. Cir. No. 19,522, decided by order January 11, 1965	6
Carroll v. *United States*, 354 U.S. 394 (1957)	9
Coppedge v. *United States*, 369 U.S. 438 (1962)	11
**Desmond* v. *United States*, 333 F.2d 378 (1st Cir. 1964)	9, 12
Dillane v. *United States*, 121 U.S. App. D.C. 354, 350 F.2d 732 (1965)	6, 7, 10, 11, 12
**Dodd* v. *United States*, 321 F.2d 240 (9th Cir. 1963)	9, 12
Hannigan v. *United States*, 341 F.2d 587 (10th Cir. 1965)	9
**Hodges* v. *United States*, 108 U.S. App. D.C. 375, 282 F.2d 858 (1960) (*en banc*), *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961)	7, 10, 11, 12

Cases—Continued	Page
**Lewis* v. *United States*, 111 U.S. App. D.C. 13, 294 F.2d 209 (1961), *cert. denied*, 368 U.S. 949 (1961)	13
Lord v. *Helmandollar*, 121 U.S. App. D.C. 168, 348 F.2d 780 (1965)	10, 11
Paulding v. *United States*, 118 U.S. App. D.C. 264, 335 F.2d 686 (1964)	9, 10
**United States* v. *Robinson*, 361 U.S. 220 (1960)	8, 9, 10
Wynne v. *Boone*, 88 U.S. App. D.C. 363, 191 F.2d 220 (1951)	13

OTHER REFERENCES

28 U.S.C. § 2255	3, 6, 9, 11, 13
Rule 32, Fed. R. Crim. P.	9, 10
Rule 35, Fed. R. Crim. P.	9
Rule 37(a)(1), Fed. R. Crim. P.	4, 7, 8, 9
Rule 37(2), Fed. R. Crim. P.	4, 7, 8, 9
Rule 45(b), Fed. R. Crim. P.	4, 8
7 Wigmore, Evidence § 2034	13

* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,970

RANDOLPH JENKINS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, tried and convicted of rape, was sentenced by the Honorable Edward A. Tamm, on April 4, 1963 to a term of imprisonment from 10 to 30 years. *United States* v. *Jenkins*, Cr. No. 1003-62. Maurice Weeks was retained to represent appellant in the criminal proceedings including the sentencing. No appeal was taken. Mr. Weeks died on October 19, 1963.

More than five months after the sentencing, on September 26, 1963, appellant, proceeding *pro se*, filed in the District Court a Motion for Reconsideration and Reduction of Sentence alleging, *inter alia*, that he was denied

the right of appeal. The Government filed its Opposition to Motion for Reconsideration and Reduction of Sentence on October 23, 1963, challenging the allegations contained in appellant's motion.

Shortly thereafter, the District Court issued an order on October 24, 1963, appointing counsel for appellant in this collateral proceeding. Appointed counsel recast the appellant's claim for relief by filing on June 14, 1966, a Supplemental Motion to Vacate and Set Aside Sentence Pursuant to Title 28, United States Code, Section 2255. The Supplemental Motion alleged that retained counsel failed to inform appellant of his right to appeal and of the time within which an appeal must be noted, which, it was asserted, constituted ineffective assistance of counsel in violation of the Sixth Amendment. The Supplemental Motion requested as relief that appellant's sentence be vacated.

A hearing on the matters raised in the Supplemental Motion was held on March 3, 1967. The appellant testified that he was not advised by retained counsel at any time of his right to appeal (Tr. 5-6). He also testified that he did not know of a right to appeal until some four months after sentencing, at which time, he stated, he was informed of this right by a fellow inmate (Tr. 5-6). Retained counsel's version of the facts was unavailable because, as previously mentioned, he died over three years before the hearing.

Edith Beard, appellant's sister, testified that she retained Mr. Weeks on appellant's behalf (Tr. 18). She said she did not attend appellant's sentencing proceeding but after trying several times contacted Mr. Weeks "about three and a half weeks later" (Tr. 18-19, 31-33). She testified that she asked Mr. Weeks if he would appeal appellant's conviction and that Mr. Weeks said "he could for Fifteen Hundred Dollars ($1,500.00)" (Tr. 19). Mrs. Beard said she did not pursue the matter because she could not afford the expense (Tr. 19).[1]

---

[1] On cross, Mrs. Beard said she first contemplated an appeal on her brother's behalf on the day he was sentenced (Tr. 21).

After the witnesses concluded their testimony the Government informed the court (Tr. 38):

> . . . I think it should be noted in the record that there have been some records kept by Mr. Wesley Williams, a fellow attorney, but he searched and could not find any records of Mr. Weeks' connection with this case.

The court, later responding to appellant's argument, said (Tr. 40):

> The Court also feels that counsel Maurice Weeks, now being dead, and having known Mr. Weeks as a practitioner in the Court, it is extremely difficult for this Court to accept the testimony.

Shortly after the hearing, on March 14, 1967 the Government submitted an Opposition to the Supplemental Motion contending, in brief, that the jurisdictional requirements for taking a direct appeal could not be circumvented in a collateral proceeding by the device of vacating the prior sentence and resentencing.

On March 29, 1967 the District Court by order denied appellant's Motion for Reduction and Reconsideration of Sentence.[2] This appeal followed.

STATUTE AND RULES INVOLVED

Rule 28, United States Code, Section 2255, provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may

---

[2] Although the order of the District Court did not so specify, presumably it denied the relief requested in the appellant's Supplemental Motion.

> move the court which imposed the sentence to vacate, set aside or correct the sentence. . . .

Rule 37(a)(1), Federal Rules of Criminal Procedure, provides in pertinent part:

> An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. . . .

Rule 37(2), Federal Rules of Criminal Procedure, provides:

> An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Rule 45(b), Federal Rules of Criminal Procedure, provides:

> When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking appeal.

SUMMARY OF ARGUMENT

I.

A criminal appeal by a defendant is initiated by the filing of a notice of appeal within 10 days following the entry of the judgment or order appealed from. The Supreme Court, on two separate occasions, has held that strict compliance with this requirement is necessary to vest appellate jurisdiction. Furthermore, the Court by these decisions has held that the right of appeal once expired cannot be revived because of excusable neglect or by the method of reducing sentence.

Appellant contends that since his right to appeal lapsed due to ineffective assistance of counsel, he is entitled in a collateral proceeding to a vacation and reimposition of sentence solely for the purpose of allowing him to appeal out of time. We think this procedure is in conflict with the Supreme Court decisions mentioned above.

If this Court should adopt the procedure requested by appellant, before being entitled to relief, the appellant should be required to demonstrate that he was denied the opportunity to present a substantial appealable question under the law as it existed at the time he could have taken but did not take an appeal. At least two other courts of appeals which have considered this problem have made this a prerequisite to relief. Moreover, a showing of a substantial appealable question would serve to dispel the considerable doubt that trial counsel, now deceased, failed to inform appellant of his right to appeal. On the other hand, the absence of a substantial appealable question would tend to show that trial counsel independently concluded that there was no basis for relief, which would constitute effective assistance of counsel even though trial counsel did not discuss an appeal with appellant.

ARGUMENT

I. The District Court properly denied appellant's § 2255 petition in which he alleged that he was not apprised of his right to appeal or the time within which the right must be exercised.

In *Dillane* v. *United States*, 121 U.S. App. D.C. 354, 350 F.2d 732 (1965) this Court held that failure to file a notice of appeal within the allotted period following a criminal conviction was a jurisdictional defect which deprived the Court of jurisdiction to entertain the appeal. The Court, however, suggested that in cases in which the defendant has not been apprised of his right to appeal or of the time within which that right must be exercised, the defendant could allege such matter in a petition filed pursuant to 28 U.S.C. § 2255 and, should the District Court find that the defendant's allegations are true, it "should, by the expedient of vacating and resentencing, restore [the defendant] to the status of one on whom sentence has just been imposed and who has ten days in which to institute a direct appeal." 121 U.S. App. D.C. at 355, 350 F.2d at 733.[3] In *Dillane*, the Court noted: "Whether there are in fact grounds for such an appeal seems to us a subject to which [the defendant] is entitled to address himself once he has been . . . [resentenced]." *Ibid.* Because *Dillane* was a direct appeal from the order denying leave to appeal *in forma pauperis*, the Government did not brief the issue of what alternatives, if any, were available in the event the order denying leave to appeal was affirmed. So far as we can ascertain, the Court's suggested method of proceeding in *Dillane* has been questioned once by the Government since *Dillane* was decided; it was questioned in *Carrell* v. *United States*, D.C. Cir. No. 19,522 decided by order January 11, 1965. But, because the facts relating to the issue of ineffective assistance were disputed, the Court's disposition of *Carrell* did not resolve the contested issue of whether the

[3] See also *Carlisle* v. *United States*, 122 U.S. App. D.C. 240, 352 F.2d 716 (1965).

Dillane procedure is permissible. We note also that *Dillane* appears to be in conflict with *Hodges* v. *United States*, 108 U.S. App. D.C. 375, 282 F.2d 858 (1960), *(en banc)*, *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961).[4] Furthermore, the circumstances of this case are somewhat unusual in that, appellant's trial counsel having since deceased, the Government has little means of rebutting appellant's allegation that he was not apprised of his right to appeal within the allotted period. For these reasons, we believe that we are not foreclosed from arguing against the suggested method of proceeding as outlined in *Dillane* or, at the very least, if the suggested method of proceeding should be allowed, that appellant, under the circumstances here, should be required to demonstrate that there was a substantial appealable question under the law as it existed at the time appellant could have taken but did not take an appeal.

A. *The District Court does not have the power to vacate and reimpose sentence solely for the purpose of allowing a defendant to take an appeal out of time.*

A criminal appeal by a defendant is initiated by the filing of a notice of appeal within 10 days following the entry of the judgment or order appealed from. Rule 37 (a), Federal Rules of Criminal Procedures.[5] Appellant asserts that an appeal from his sentence was not taken within 10 days following his sentence because he was unaware of his right to appeal, and because his trial counsel neglected to inform him of this right and of the requirement that an appeal be noted in 10 days. As is suggested in *Dillane*, appellant seeks to have his sentence vacated and reimposed in order that he would be in a position to take the appeal he did not take almost five years ago. We submit that appellate jurisdiction in criminal appeals depends upon strict compliance with Rule 37(a), and that

---

[4] See *infra* at 10-11.

[5] See references to a rule will be to the Federal Rules of Criminal Procedure unless otherwise listed.

failure to comply cannot be rectified in a collateral proceeding.

The failure to take an appeal within the prescribed period has arisen in a variety of factual situations producing equally various results. We begin with *United States* v. *Robinson*, 361 U.S. 220 (1960). In *Robinson*, an appeal was filed 11 days late due to a misunderstanding between counsel and the defendant, each believing the other was going to file a timely appeal. Pointing to an analogy with civil appeals (Rule 37, Federal Rules of Civil Procedure), the defendant argued that an appeal, often crucial in a criminal case, should be allowed though untimely if the delay was accountable to "excusable neglect." Rejecting this argument, the Court interpreted Rule 37(a) in conjunction with Rule 45(b) to prohibit judicial enlargement of the time for taking an appeal. In so doing, the Court reiterated the basic axiom that a timely filing of an appeal as "prescribed by Rule 37(a)(2) is mandatory and jurisdictional." 361 U.S. at 224. It also made clear, in a statement of broad application, that (361 U.S. at 230):

> If . . . the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable too think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below [allowing "excusable neglect"], many appeals might—almost surely would—be indefinitely delayed.

Finally, the Court noted that substantial justice could be achieved without a long-delayed appeal by the use of specified collateral remedies. 361 U.S. at 230, fn. 14.

The inviolability of the 10-day requirement is strikingly illustrated in a case where the defendant did everything he normally would do to perfect an appeal. *Berman* v. *United States*, 378 U.S. 530 (1964).[6] The fault, if any, for failing to take a timely appeal lay with counsel, who

[6] The facts are recited in the dissenting opinion by Justice Black.

fell ill on the last day of the 10-day period. The District Court, in an effort to renew a basis for appeal, reduced the defendant's sentence under Rule 35, but to no avail. A successful challenge to the jurisdiction of the Court of Appeals was affirmed by the Supreme Court on the authority of *Robinson* in a one-line opinion.

The jurisdictional strictures laid down in *Robinson* and strengthened in *Berman* pose a seemingly harsh result for those defendants who, without fault, failed to take a timely appeal. But the imposition of jurisdictional rules rarely make an easy case. Appellate jurisdiction, by definition, makes no allowance for equities; or as the Supreme Court stated in a comparable situation (*Carroll* v. *United States*, 354 U.S. 394, 405 (1957): "Appeal rights cannot depend on the facts of a particular case. The Congress necessarily has had to draw the jurisdictional statutes in terms of categories". And while the *Robinson* decision steadfastly maintains those policies upon which Rule 37(a) is founded, its impact upon the faultless defendant is to a great extent mitigated by the broad collateral remedies, in some instances indefinitely available.[7]

Appellant strives to avoid this jurisdictional prerequisite by requesting in a Section 2255 proceeding a vacation of sentence and resentencing from which he could appeal. In a series of cases where a direct appeal was dismissed because untimely, this alternative method of securing an appeal was suggested by this Court, provided the delay was due to ineffective assistance of counsel.[8] *Paulding* v.

---

[7] *E.g.*, the writ of coram nobis, vacation of reduction of sentence under Rule 35, and collateral proceedings under 28 U.S.C. § 2255.

[8] We recognize that other courts have formulated procedures or holdings which would allow an appeal outside of the 10-day requirement for defendants whose counsel either neglected to notify them of the right to appeal or failed to fulfill a request for an appeal. *Desmond* v. *United States*, 333 F.2d 378 (1st Cir. 1964); *Calland* v. *United States*, 323 F.2d 405 (7th Cir. 1963); *Dodd* v. *United States*, 321 F.2d 240 (9th Cir. 1963); *Boruff* v. *United States*, 310 F.2d 918 (5th Cir. 1962); *Hannigan* v. *United States*, 341 F.2d 587 (10th Cir. 1965). This problem will be largely eliminated by the change in Rule 32, effective July 1, 1966, which requires the

United States, 118 U.S. App. D.C. 264, 335 F.2d 686 (1964); *Dillane* v. *United States*, 121 U.S. App. D.C. 354, 350 F.2d 732 (1965); *Carlisle* v. *United States*, 122 U.S. App. D.C. 240, 352 F.2d 716 (1965). While the defendant's testimony, if true, indicates that he did not receive effective assistance of counsel under the language of these cases, we nevertheless urge this Court to decline to follow the procedure suggested in *Dillane* of allowing what is in effect an untimely appeal, because, in our view, it conflicts with the holdings in *Robinson* and *Berman*. *Robinson* unequivocally held that the jurisdictional prerequisites of the Rules make no allowance for judicial expansion of the time within which to take an appeal. This proscription encompasses, in the case of *Berman*, attempts to enlarge the appeal time by the technique of reduction of sentence. Since there is no practical distinction between reducing a sentence with the aim of enlarging appeal jurisdiction, and vacating and resentencing with the same aim, the holding in *Berman* should have application here.

Nor should a different result obtain because the lack of effective assistance of counsel here may have been inexcusable while in *Berman* accidental. The defendant here and in *Berman* are on the same footing—their appeal time expired through no fault of their own, while both have access to collateral remedies. To allow an untimely appeal here because trial counsel might have been more culpable than trial counsel in *Berman* would make the right to appeal turn upon the most tenuous grounds.

As we noted earlier, the suggested procedure outlined in *Dillane* appears to be inconsistent with the decisions of this Court in *Hodges* v. *United States*, 108 U.S. App. D.C. 375, 282 F.2d 858 (1960) *(en banc)*, *cert. dismissed as improvidently granted*, 368 U.S. 139 (1961) and *Lord*

District Court to inform the defendant of his right to appeal in all cases, whether represented by counsel or not. However, a solution to this problem would have logical application to those instances where the District Court fails to fulfill the mandate of amended Rule 32.

v. *Helmandollar*, 121 U.S. App. D.C. 168, 348 F.2d 780 (1965). In *Hodges*, a direct appeal was not timely noted because the defendant alleged that he was unaware of the time requirements and that counsel was denied an opportunity to consult with him about an appeal. He sought as a remedy a determination in a Section 2255 proceeding which would be equivalent to a direct appeal. In an *en banc* decision, a majority of this Court held that remedy impermissible, and concluded (108 U.S. App. D.C. at 378, 282 F.2d at 861): "The scope of relief grantable under Section 2255 or in habeas corpus is not to be diminished by failure to appeal, but neither is it to be increased." Citing *Hodges* as authority, the Supreme Court in a definitive analysis of the right to a criminal appeal commented (*Coppedge* v. *United States*, 369 U.S. 438, 442-443, fn. 5 (1962)): "If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may irrevocably be lost."

Finally, in *Lord* v. *Helmandollar*, *supra*, the defendant in a civil action to secure, out of time, an appeal by vacation and re-entry of judgment, this Court flatly dismissed the appeal for lack of jurisdiction. Since collateral remedies for a criminal judgment greatly exceed in scope and availability those for a civil judgment, there is no compelling reason for conferring an oblique method of direct appeal from a criminal action while denying the method in civil actions. For the foregoing reasons, we think the Court should reconsider its dictum in *Dillane* and decline to permit, by one method or another, what is in effect a direct appeal as relief in a Section 2255 proceeding.

B. ***Even if the District Court has the power to vacate and reimpose sentence for the purpose of allowing an appeal out of time, under the circumstances of this case appellant should demonstrate that he was denied the opportunity to present a substantial appealable question under the law as it existed at the time he could have taken but did not take an appeal.***

If the Court decides to follow the procedure suggested in *Dillane*, under the circumstances of this case we think appellant should be required to demonstrate that he was denied the opportunity to present a substantial appealable question under the law as it existed at the time he could have taken but did not take an appeal. No less than two other courts of appeals have made this a requirement in fashioning a remedy for the defendant who failed to take a timely appeal due to ineffective assistance of counsel. *Desmond* v. *United States*, 333 F.2d 378 (1st Cir. 1964); *Dodd* v. *United States*, 321 F.2d 240 (9th Cir. 1963). This requirement would be particularly appropriate under the unusual circumstances presented here, because it would serve to dispel in part the considerable doubt that deceased trial counsel, retained by appellant and of unquestioned professional competence, neglected to inform appellant of his right to appeal, or even discuss an appeal with him.[9] In other words, the fact that no appeal was taken coupled with the fact that a substantial appealable question existed would tend to verify the testimony that retained counsel failed to inform appellant of his right to appeal.

Moreover, this Court has held that if retained counsel made an independent judgment based upon the outcome

---

[9] In *Hodges*, which involved a similar contention, this Court observed (108 U.S. App. D.C. at 378, fn. 4, 282 F.2d 861, fn. 4): "If either [of defendant's two attorneys] had perceived any substantial basis for an appeal, it is almost incredible that [defendant] would not have been so advised prior to . . . the last day for taking an appeal." The District Court in the hearing below expressed similar disbelief. (Tr. 40-41)

of the criminal proceeding that an appeal was not warranted, there would be no basis for a finding of ineffective assistance of counsel, even though counsel did not discuss an appeal with the defendant. *Lewis* v. *United States*, 111 U.S. App. D.C. 13, 294 F.2d 209 (1961), *cert. denied*, 368 U.S. 949 (1961). There is at least a strong possibility that trial counsel made such a judgment here, and accordingly did not discuss an appeal with the defendant. The absence of a substantial appealable question in the trial would tend to support such a possibility.[10]

[10] If the Court should decline to follow either alternative urged by the Government, we do not think reversal is required. We note that the District Court simply denied appellant's motion for reduction of sentence and did not make any findings regarding appellant's allegation which supported his supplemental Section 2255 motion, that he was not advised of his right to appeal within the allotted period. The District Court may have denied appellant relief under Section 2255 either because it disbelieved the testimony given or because it rejected appellant's contention as a matter of law (Tr. 40-41). It is true that appellant's and his sister's testimony was not verbally contradicted. But it is well established that the trier of fact is not required to accept uncontradicted testimony as truthful. *Wynne* v. *Boone*, 88 U.S. App. D.C. 363, 365, 191 F.2d 220, 222 (1951); 7 Wigmore, Evidence § 2034 (3rd Ed. 1940). Thus in the event the Court rejects the Government's argument, we believe it would be appropriate to remand the case to the District Court to make findings of fact or to whether appellant was advised of his rights to appeal and of the time within which the right must be exercised.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
JOHN J. MCKENNA,
Assistant United States Attorneys.

FRANK X. GROSSI, JR.,
Department of Justice Attorney.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 307264 787